colour of such office, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both."

The facts were not in dispute. At about 9.20 p.m. on April 7, 1971 the applicant had been taken, along with three others, by the police patrol car to New Town Police Station, Ipoh. There he made a report in the standard form No. 55, wherein under the heading of "occupation" he wrote "S.S. Police, Penang", and appended his signature thereto followed by the words: "D.P.C. 1209". As to the contents of the report, there was not a word therein suggesting that, at the bar of the Merlin Hotel in Ipoh, where he had had an altercation with and struck one Goh Ah Kong, he was there by virtue of his pretended office or that any act was done by him under colour of such office.

The learned magistrate took the view that an essential ingredient of the offence under section 170 had not been proved, quoting *Ratanlal* who said: —

"The phrase 'an act under colour of such office' points to acts *which could not have been done without assuming official authority or responsibility* and would not connote acts of a ministerial or mechanical character, which might be done without the justification of office in the person doing them".

In coming to his decision the learned Magistrate said: —

"In this case making a report is a right open to any member of the public and not only to police officers. It is not sufficient if such act is at the same time a duty on persons holding the office he impersonated. In other words merely because making a report is a duty on a police officer is not sufficient".

The Public Prosecutor appealed against the order of acquittal to the High Court and the judge, whilst complimenting the magistrate for his admirable judgment, came to the opposite conclusion, holding that, as he read the section "it appears that the nature of the act has not to be necessarily related to the functions of the office assumed". He accordingly set aside the order of acquittal and directed that the accused be called upon to enter on his defence. Expressing some doubt in himself about the correctness of his decision, since Indian authorities seemed to be six on one side and half-a-dozen on the other, he agreed to refer the question of law for the decision of this court on an application by counsel for the accused which was seconded by the Deputy Public Prosecutor.

Strictly speaking, the criminal case had not been concluded and a reference under section 66 was premature, but, taking the practical view that our decision should have to be given eventually, we decided to hear the arguments on both sides.

On behalf of the applicant counsel repeated the arguments which found favour with the learned Magistrate. In answer, Senior Federal Counsel relied on *Emperor* v. *Aziz-Ud-Din*[1] where the accused, posing as a head constable, had bullied a fruit-seller into selling him fruit at a quarter of its actual value. It was argued on his behalf that the act which the accused did was not one which, if he really had been a head constable, he *could legally* have done. But Banerji J. held otherwise: —

"I am unable to agree with this contention. There can be no doubt that the applicant pretended to hold a particular office as a public servant, namely, the office of head constable, knowing that he did not hold such office, and that in such assumed character he attempted to do an act under colour of such office. *It is not in my opinion necessary for the application of the section that the act done under colour of office should be a legal act on the part of the accused.* If he pretended to be a police officer and as such police officer tried to extort money or things from a fruit-seller, I think the offence under section 170 was committed."

In our view the provisions of section 170 are perfectly clear. Let the provisions be read in the light of the facts of each particular case — as the judge did here — and no occasion should arise for confusion being worse confounded.

This applicant, Tomm Wong, did pretend to be a detective police constable, which he was not, and in such assumed character, wrote out his report, which act, by his signature and false description as "D.P.C. 1209", was an act done under colour of his pretended office. The contents of the report or his motive in so doing were wholly immaterial and irrelevant in relation to the charge and this, if we may say so with respect, was where the learned magistrate fell into error. Sometimes, the reference to too many so-called authorities tends to mislead and confuse. A case is only an authority on its own facts — or facts so closely similar as to be indistinguishable.

The first part of the question under reference clearly has no application to a charge under section 170 since it relates to acts done "by a person who in fact and in truth holds such office" — his acts being merely outside the scope of his authority. In such cases, of course, he would *not* be a person *pretending* to hold any particular office as a public servant. An abuse of authority is not within the ambit of section 170. But an offence under this section is committed whenever any person falsely holds himself out to be a public servant, and does or attempts to do any act whatsoever under colour of such office. The harmless character of that act or attempt may be relevant as to punishment, but the offence under section 170 is nonetheless committed whenever any act is done or attempted to be done by a person impersonating a public servant. This is our plain answer to the question.

Order accordingly.

FEDERAL TRANSPORT SERVICE CO. LTD. & ORS. v. ABDUL MALIK & ORS.

[O.C.J. (Chang Min Tat J.) February 1, 1973]

[Penang — Civil Suit No. 193 of 1972]

Companies — Suit by shareholders against directors — Position of director — Contracting with company — Preservation of company's assets — Appointment of receiver and manager.

In this case the plaintiffs, on behalf of the shareholders in a private limited liability company brought an action to restrain the defendants from acting as directors. The plaintiffs charged the defendants "with thoroughly irresponsible and unsatisfactory mismanagement" causing the company to sustain heavy losses. Among the allegations was an allegation that some of the company's buses had been leased to one of the directors.

Held: in the circumstances where there were serious disputes among the shareholders and as the assets were in

jeopardy the court would make an order for the appointment of a receiver and manager. The appointment would be limited until the affairs of the company were sorted out and until the company had a proper board of directors.

Cases referred to:-

(1) *In re Victoria Steamboat Ltd.* [1897] 1 Ch. 158.

(2) *Featherstone* v. *Cooke* (1893) 16 Eq. Cas. 298.

(3) *Stamfield* v. *Gibbons* [1925] W.N. 11.

(4) *Sime Darby Co. Ltd. & Anor.* v. *Beecham* [1968] 2 M.L.J. 161.

CIVIL SUIT.

O. Phipps for the plaintiffs.

Yeap Ghim Guan for the defendants.

Chang Min Tat J.: In this action, the plaintiffs for themselves as shareholders in a private limited company, the Federal Transport Services Co. Ltd. hereafter called the company, and for others named but not joined in, also shareholders in the same company, as well as the company itself, sued the defendants for

(a) an injunction restraining the defendants from acting as directors of the company,

(b) an injunction restraining the defendants from dealing with the funds of or using the seal of or dealing in any manner with the properties and assets of the company or otherwise interfering with the management of the company,

(c) a declaration that the defendants are not directors of the company,

and for costs and such further or other order as the court may deem fit.

The prayer for the first injunction was grounded on a resolution said to have been passed at an extraordinary general meeting of the company held on 23 April 1972 at the Bangunan UMNO Lama, Jalan Kelab Butterworth, which purported to forthwith remove from office the defendants as such directors.

It is somewhat curious, if I may so advert to this as a fact without disrespect, to note that the company itself is the first plaintiff. How correct this is in the light of the true facts of this case is nowhere shown to me but if I may hazard a guess, this might explain the conditional appearance entered by the defendants. However no further action on this proposed objection was taken and the time having lapsed, the appearance stood to be treated as unconditional.

This is basically an action by minority shareholders against the defendants. This became clear, not on the writ, but in the affidavit filed by Mustapha bin Pachik, the 3rd plaintiff in support of an application by notice of motion for interlocutory orders of injunction. Of the issued capital of $265,550 made up of 26,555 fully paid up shares of $10 each, all the plaintiffs excepting the 1st plaintiff which is the company itself, held 778 shares as against the 849 paid up shares held by the defendants jointly. The state of the proxies at any given time was never referred to in any of the affidavits.

In this affidavit, the deponent, the 3rd plaintiff, charged the defendants with "thoroughly irresponsible and unsatisfactory mismanagement" causing the company to sustain heavy losses. The acts of mismanagement alleged were: —

(a) the defendants had not submitted to the members any proper profit and loss account or any account whatsoever

(b) on or about 16 August 1971, the defendants leased five of the company's buses to Ghazali bin Mohamed Saad at a rent of $600 per month for operating privately and for his own benefit and in breach of the terms of the licence and haulage permits

(c) on 21 September 1971 the defendants allotted some 4430 new shares to themselves, in breach of Article 23 of the company's articles of association and without the other members of the company being given an opportunity to take up such allotments.

It was also alleged that at the extraordinary general meeting called for and convened on 23 April 1972, at which some 150 members attended, a resolution was passed, said to be unanimously, removing the defendants from office. However it was admitted that the 2nd defendant as chairman of the meeting opposed this resolution and demanded a poll but it was said that when his right to call a poll was challenged, the 2nd defendant and the other defendants left the meeting. The meeting was carried on in their absence and a caretaker body appointed to manage the affairs of the company.

The answer to the plaintiffs' allegations against the defendants was made by Haji Ahmad bin Said, the 2nd defendant. He claimed to have been duly authorised to depose to the affidavit by the other defendants as directors of the company. He said that at the material time, the 3rd plaintiff himself was a director and with his holding thrown in, the directors held not 849 shares but 904. Then he refuted the charge of irresponsibility. He attributed any mismanagement to the previous board of directors in office prior to 1968. As for the accounts, he put the blame for the absence of audited accounts similarly on those directors, who were responsible for the loss of the records for 1967 and 1968.

He admitted the lease of the 5 licensed buses to Ghazali bin Mohamed Saad, the 8th defendant but explained that the route had been run at a loss. He maintained that "this method of operations ensured an income to the company and was not in contravention of the law."

With regard to the extraordinary general meeting of 23 April 1972, the deponent strenuously denied that the version given by Mustapha bin Pachik was the correct one. He alleged that the vote of no confidence was defeated by a poll, called for, not by himself but by Hassan bin Saad and supported by 5 other shareholders present and that the proxies were correctly checked. He denied that there was a show of hands in favour of the motion. He also denied a walk-out and he averred that it was only after the meeting had been adjourned after completing the business on the agenda, that the dissentients held another meeting and this time passed the vote of no confidence on which they justified their action.

He also referred to several actions filed and pending in this court in respect of the company.

There is thus in the affidavit evidence of a serious conflict with regard to the meeting on 23 April 1972, particularly whether the vote of no confidence was in fact and validly passed and whether the defendants continue to be a duly constituted board of directors.

In the absence of any enquiry which would enable me to come to as confident a conclusion as is possible in a Court of law on the meeting of 23 April 1972, I do not conceive it safe to base my decision on this averment. The same may be said of the matters relating to the accounts or the allotment of shares. The lease of the buses is however of another kind. It is a lease purportedly by the company, from the board of directors to one of themselves.

The position of a director has been summarised in Palmer's Company Law (20th Edn.) at page 554 thus:

"... the position of a director, vis-a-vis the company, is that of an agent who may not himself contract with his principal and that it further is similar to that of a trustee who, however fair a proposal may be, is not allowed to let the position arise where his interest and that of the trust may conflict.

It follows from these propositions that, unless the articles confer on a director express powers of contracting with the company, a director's powers of so contracting are extremely limited. He may take up shares in the company (though he cannot vote in respect of allotments to himself); he may subscribe for debentures in the ordinary course of business; but otherwise he is, like a trustee, disqualified from contracting with the company; and for a good reason: the company is entitled to the collective wisdom of its directors, and if any director is interested in a contract, his interest may conflict with his duty, and the law always strives to prevent such a conflict from arising. Not even if it can be shown that the contract in question is a fair one is the director allowed to enter into it, for the courts will not, in such cases, look into the merits, but adhere strictly to the rule that the possible conflict of interest and duty must not be allowed to arise. 'No man', said Lord Cairns L.C., 'can in this court, acting as an agent, be allowed to put himself in a position in which his interest and duty will be in conflict.'"

It will be well if all of us give this passage its due attention.

I have also had an inspection of the memorandum and articles of association and have satisfied myself that the articles do not confer any express power on any director to contract with the company.

It is, in my view, no answer to say that the route was previously run at a loss and that the lease would ensure an income to the company. It is clearly the duty of the company to so organise the affairs of the company as to ensure the maximum benefit to the shareholders. Adjustments in the schedule and in the route may well turn a loss into a profit. For myself, I find it inconsistent on the part of the defendants for them to suggest that the company could not make a profit on this route with the buses available and licensed for this purpose while one of them could, as he presumably must be able to do if he undertook the service. It also seems to me that the defendants had, perhaps not deliberately, failed to notice that the hire of 5 buses at a meagre monthly rental of $600 would not meet the normal depreciation for this type of machinery and would not in terms of true accounting be an income or that apart from the breach of fiduciary relationship, their consent to the user of the haulage permits was an indefensible breach of the law. It was however said that the lessee of the buses had ceased to become a director. There is a letter on record dated 15 April 1972 signed by this gentleman in which he referred to his inability to take up the minimum shares to qualify as a director. The fact remains however that the lease to him was made when he was a director and this lease remains to be seen in the light of his standing at the time it was effected. And, in passing, this fact does seem to be the question whether he or the other directors had at any time the qualifications to be members of the board.

Mr. O. Phipps for the plaintiffs relied on three cases. The first was *In re. Victoria Steamboat Ltd.*[1] This case concerned an action by debentures-holders of a limited company to enforce their securities, and the Court held that it had jurisdiction to appoint not only a receiver of the company's property but also a manager of its undertakings and business, where the security was in danger. The next case was *Featherstone* v. *Cooke.*[2] It concerned certain disputes between different members of the government body of a company which prevented its affairs from being carried on properly and that was held to be a ground for the intervention of the court by injunction and receiver to protect the property of the company. The Court however limited the interference of the Court till the appointment of a government body. *Stamfield* v. *Gibbons,*[3] the third case relied upon, was a decision on similar lines.

Mr. Yeap Ghim Guan for the defendants urged strongly on me the distinct advantages of preserving the *status quo* on a consideration of the balance of convenience. He relied on the case of *Sime Darby Co. Ltd. & Anor.* v. *Beecham.*[4]

When it was pointed out to Mr. O. Phipps that the cases relied by him concerned quarrels between directors, and the relief asked was for a receiver, for which he had not asked, his first reply was to apply to amend or to have this prayer included in the general prayer. His next was to re-submit on the same authorities for the appointment of a receiver, on the same ground, namely, the jeopardy of the company's assets.

In this connection, it is pertinent to note that in addition to the 8th defendant, the 2nd defendant was at the hearing no longer a director. He was the chairman at the time the extraordinary general meeting was held, but had since resigned his directorate and by extension abdicated from the chair. Yet he was the deponent of the affidavit in reply.

The remaining directors are said to be the 1st, 3rd, 4th, 5th, 6th and 7th defendants. They could constitute a valid board since the memorandum specified that the number should not be less than five, but nowhere had it been mentioned who the new chairman is or indeed whether he had been appointed.

While I agree that the balance of convenience is a factor of considerable import in deciding whether to grant an injunction or not, it cannot, it seems to me,

be gainsaid that it is only one of the factors to be considered.

The cases relied on by Mr. O. Phipps can be easily distinguished. As already noted, they concerned disputes between members of the governing bodies of companies. This is perhaps strictly not such a case. But it is to be borne in mind that the 3rd plaintiff was a previous director and that the 2nd and 8th defendants had now resigned from the board. I do not consider that the facts are without significance, but even without taking them into consideration, it will be seen that there is a common factor, the preservation of a company's assets which also involves in turn the proper management of its affairs. In such a situation, the following passage from Malins V.C. from his judgment in *Featherstone* v. *Cooke, supra:*

"With regard to private partnerships, nothing is of more frequent occurrence than the quarrel of partners. If parties quarrel, oust each other from the management, or so conduct themselves that the partnership cannot go with advantage it is every day's practice for the court to interfere by injunction and appoint a receiver if necessary. With regard to public companies, I apprehend the same principle is applicable. If a state of things exists in which the governing body are so divided that they cannot act together, and there is the same kind of feeling between the members as there is frequently in the case of private partnerships, it is clearly within the rule of this court to interfere and it will do so."

appears apt and applicable. I am aware that this is not an action by debenture-holders nor is it a winding-up petition, but since it does not serve the purpose of the shareholders, considered as a whole, that this transport business with its enormous potentials and directed for the benefit of the bumiputras, to have the company wound-up, then it seems to me that where the assets are in jeopardy, and in the circumstances of the serious disputes among the shareholders, the only way to save the company and to ensure its continued operations would be to appoint a receiver as well as a manager.

The appointment will be limited until the affairs of the company are sorted out and until it is ascertained who are the duly constituted directors.

I would however venture a hope made in the interests of all concerned that a board of directors may soon be in control who will command the support of the shareholders, so that the company can be run as a going concern and the spate of litigation that is at present bedevilling the fortunes of this company will be abated.

Order accordingly.

YAP CHAI CHAI & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Ong C.J., Gill and Ong Hock Sim F.JJ.)

February 13, 1973]

[Ipoh — Federal Court Criminal Appeal No. 23 of 1972]

Criminal Law and Procedure — Whether mandatory for trial judge to enter on record his opinion that there was case to answer at the end of prosecution case — Murder — Penal Code, s. 34 and 302.

Criminal Procedure Code (s.s. Cap. 21) s. 125(1) — Confession recorded by magistrate — Retracted confession.

Evidence Act, 1950, s. 30 — Confession by co-accused — Taking into consideration confession against other accused.

This was an appeal against the conviction of the appellants for murder. On appeal it was argued (1) that it was mandatory for the trial judge at the close of the prosecution to enter on the record his opinion that there was a case to answer and that his failure to do so rendered the trial a nullity; (2) the confession of the second appellant which was retracted, was wrongly admitted in evidence; (3) the second appellant's confession should not have been used or considered as evidence against the first appellant, of common intention.

Held: (1) it is not mandatory for the trial judge at the close of the prosecution to record his opinion that there was a case to answer. The facts in this case established a *prima facie* case and the learned trial judge would have been wrong to withdraw the case at that stage from the jury;

(2) even if the retracted confessional statements of the second appellant have been wrongly admitted, the verdict was the right one and resulted in no miscarriage of Justice; but on the facts the statements were rightly admitted;

(3) the confession of the second appellant was rightly taken into consideration against the first appellant.

Per Ong C.J.: "We do not think that the provisions of section 204(2) of the Criminal Procedure Code (S.S.) had any application, nor do we agree with the contention... that it was mandatory for the judge at the close of the prosecution to enter on the record his opinion that there was a case to answer — the failure to do so rendering the trial a nullity. As authority for this proposition two cases were cited to us, being the judgements delivered by Willan C.J. in *Ng Peng Choon* v. *Public Prosecutor*(1) and *Govindasamy* v. *Public Prosecutor.*(2) In our opinion the provisions relating to trials with assessors, as in those cases, have no application to jury trials; in any event, we must say, with all respect, that we unanimously disagree with the learned Chief Justice. What is always of paramount importance in the administration of criminal justice is a fair trial — not such excessive legalism as to give the ordinary meaning of words the sacrosanctity of a ritual."

Cases referred to:-

(1) *Ng Peng Choon* v. *Public Prosecutor* [1947] M.L.J. 87.

(2) *Govindasamy* v. *Public Prosecutor* [1949] M.L.J. 101.

(3) *Reg.* v. *Hester* [1972] 3 W.L.R. 910, 930.

(4) *Director of Public Prosecutions* v. *Kilbourne,* [1973] 2 W.L.R. 254.

(5) *Abdullah bin Awang Bongkok* v. *Public Prosecutor* [1956] M.L.J. 90.

(6) *Herchun Singh & Ors.* v. *Public Prosecutor* [1969] 2 M.L.J. 209, 211.

FEDERAL COURT.

A. Krishnan for the first appellant.

Datuk S. P. Seenivasagam (*R. Rajasingham* with him) for second appellant.